No. 83-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Petitioner,

v.

PAUL D. JOHNSON, *et al.*,

Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

(i) Whether Section 905(a) of the Longshoremen's and Harbor Workers' Compensation Act extends immunity from suit to the owner of a construction project who voluntarily provides a wrap-up insurance plan for the benefit of contractors and sub-contractors, despite the plain language of Section 905(a) limiting such immunity to the immediate employer of the injured employee.

(ii) Whether an injured construction worker may be barred from pursuing his common law right to sue a third person, despite the plain language of Section 933(a) of the Longshoremen's and Harbor Workers' Compensation Act preserving that right.

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ADDITIONAL RELEVANT STATUTES

In addition to the Statutes listed by petitioner, the following provision is relevant:

Section 933 of said Act (33 U.S.C. § 933 (1976)) provides in pertinent part:

(a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

COUNTERSTATEMENT

These consolidated cases pose two related questions for the Court's resolution: Whether the Washington Metropolitan Area Transit Authority ("WMATA" or "the Authority") is a third person subject to liability in tort under Section 933(a) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or the "the Act"), 33 U.S.C. § 901 *et. seq.* and its District of Columbia extension, D.C. Code §§ 36-501 *et. seq.* (1973) ("DCWCA") and whether it is immune from such suits by virtue of the operation of Sections 904(a) and 905(a) of the Act. The factual setting for WMATA's claim to statutory immunity, and the lower courts analyses of these claims, are described below.

WMATA'S Coordinated Insurance Program

Under all construction contracts awarded by the Authority prior to July 30, 1971 (Phase I), each contractor-employer and subcontractor-employer secured workmen's compensation insurance for its own employees (J.A. 261). On July 31, 1971, WMATA unilaterally initiated its Coordinated Insurance Program ("CIP") (J.A. 261), which was "a method of guaranteeing that all contractors and subcontractors of whatever tier and the Washington Metropolitan Area Transit Authority are covered for Statutory Workmen's Compensation-Employer's Liability Insurance (D.C. benefits), Comprehensive General Liability, including Products Insurance and All Risk Builders Risk Insurance." (J.A. 104). Under this plan, commonly referred to as "wrap-up" insurance (Pet. Br. at 39, n. 56), WMATA paid the premium costs for the insurance coverage provided, and contractors were expected to

recognize this fact when submitting their bids (J.A. 104). The CIP applied to all construction contracts awarded by WMATA after July 30, 1971 and to all subcontracts thereunder. (J.A. 261). WMATA's own employees are not covered under the CIP for workmen's compensation, because the Authority is a qualified self-insured employer under Section 932 of the Act.

The insurances provided under the CIP apply only to the activities of WMATA's contractors and these contractors' sub-contractors at WMATA construction sites, and "does not apply to the operations of any contractor in his regularly established main or branch office, factory, warehouse, or similar place nor to any employees of such operations." (J.A. 108). The Authority reserves the right to change the terms and conditions of its CIP, and in the event of cancellation by the insurance carrier, to require the contractors to secure alternative insurance, in which event WMATA agrees to reimburse its contractors for the cost of procuring the alternative insurance (J.A. 108-109).

The CIP approach offers tremendous cost savings to an owner. This is the primary reason for its use.[1] The Authority receives the benefit of any premium rebates which may be returned by the insuror. Under wrap-up, contractors and subcontractors do not share in the monetary benefit of safe work or the monetary penalty for unsafe work (J.A. 76).[2] Although WMATA paid the premium costs, the insurance was procured for the benefit of the contractors and their subcontractors (J.A. 106), and Certificates of Insurance evidencing the coverages

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[1] Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-0025-77-13, at 1-8 (Dept. of Transp. 1977).

[2] In June, 1978, the Petitioner herein introduced the WMATA Construction Safety Incentive Award Program. *Walker* v. *Bechtel Assoc. Prof. Corp., D.C.*, Deposition of Donald Lahr, August 28, 1981 at 31. The initiation of this incentive program, included at J.A. 159-161, followed recommendations of the A. A. Mathews study (J.A. 68) and the Barrett report (note 1, supra, at 4-6) to create monetary incentives to contractors for good safety performance. Though included in the Joint Appendix, the Safety Award Program was not a part of the record below in the *Johnson* case, nor was it a part of the record in any of these consolidated cases. Presumably the exhibit was reproduced from a more recent edition of WMATA's Coordinated Safety Program and Reporting Procedures. In any event, the Safety Award Program was not applicable to any of the construction sites involved in this case. It applied only to contracts awarded after June, 1978.

provided by CIP were issued to the contractors and subcontractors covered by the policies (J.A. 106-108, 110-113, 225). All workers' compensation claims since the CIP was initiated have been paid in the name of and on behalf of the named insured contractor-employer *(see*, e.g., J.A. 47).

The District Courts' Decisions

The first of the District Court decisions was the memorandum opinion of Judge June Green filed on July 30, 1982.[3] Judge Green's decision was founded on the conclusion that under the CIP, WMATA, and not Mr. Eighmey's employer, "secured" the compensation insurance (Pet. App. 2a). Because WMATA "secured" the insurance, the court reasoned, it was entitled to the *quid pro quo* immunity of an employer under Section 905(a) (Pet. App. 2a). The decisions of District Court judges Howard Corcoran (Pet. App. 6a-12a) and Charles Richey (Pet. App. 13a-18a) employed similar reasoning but followed this legal conclusion to its logical result: that the injured employees' employers had "failed" to secure workers' compensation under the CIP, and that the employee could therefore sue his employer in tort (Pet. App. 11a, note 2; Pet. App. 17a-18a). In effect, the district judges held that either the contractor or the subcontractor may secure workers' compensation benefits for the subcontractor's employees (See Pet. App. 15a-16a). In the event that the contractor exercises its option to "secure" the compensation insurance before the subcontractor does, it becomes immunized from suit by the subcontractor's employee under Section 905(a) while the subcontractor becomes a "third person" subject to suit under Section 933(a) or a noncomplying employee under Section 905(a) (Pet. App. 11a, n.2, 17a-18a).

The District Courts apparently saw no significance in the fact that the named insureds under the CIP were the employer-contractors and employer-subcontractors. Nor did the courts believe that it was signif-

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[3] Petitioner incorrectly states (Pet. Br. at 11, n. 16) that it filed the affidavit of its Secretary in support of its Motion for Summary Judgment in the *Eighmey* case. In fact, Judge Green ordered, *sua sponte*, a hearing on the issue of WMATA's statutory immunity on June 21, 1982 (J.A. 12, NR. 35). Oral hearings were held pursuant to the Court's sua sponte order on July 15 and 26, 1982 (Pet. App. 1a). WMATA filed neither a formal motion for summary judgment nor any documentary exhibits or affidavits in the *Eighmey* case.

icant that compensation benefits were paid on behalf of the immediate employers or respondents, against whom, in every case, the workers' compensation claims were filed. The District Court decisions also rejected respondents' arguments that the contract documents themselves disproved the contention that a contractor-subcontractor relationship existed between the Authority and its prime contractors. *(See e.g.* Pet. App. 28a).

The Court Of Appeals' Decision

The Court of Appeals reversed the District Court decisions. The court concluded that the statutory purpose of Sections 904 and 905(a) was to impose only a "secondary, guarantee-like liability" on a general contractors (Pet. App. 53a). The subcontractor-employer is primarily liable and hence is required to "secure" compensation for his employees (Pet. App. 53a). The court held that only where the subcontractor fails to secure compensation for his employees pursuant to his primary statutory obligation does the general contractor have a legal obligation to provide workers' compensation to the subcontractor's employee (Pet. App. 52a). The court relied on the rationale of *Probst* v. *Southern Stevedoring Co.*, 379 F.2d 763, (5th Cir. 1967) and *Thomas* v. *George Hyman Construction Co.*, 173 F. Supp. 381 (D.D.C 1959), stating that "courts have allowed a general contractor to invoke the statutory immunity *only* when he was *legally required to*, and did in fact, provide workmen's compensation insurance" (Pet. App. 52a).

The court concluded that WMATA's " subcontractors"[4] had the primary obligation to "secure" workers' compensation benefits for their employees under Section 904(a) (Pet. App. 55a). WMATA's voluntary introduction of the CIP supplanted the subcontractor's primary obligation to secure compensation, and thus "pre-empted the proper functioning of the [statutory] scheme." (Pet. App. 55a). The court did not reach the question of whether the subcontractor-employers had satisfied their obligation under Section 904(a) to "secure" compensation by participating in the CIP. (Pet. App. 56a, n.16)

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[4] The Court of Appeals did not discuss the issue of whether WMATA is in a contractor-subcontractor relationship with appellant's employers. It apparently assumed for purposes of its decision the existence of a contractor-subcontractor relationship.

The court concluded that "WMATA is amenable to suit as a potentially liable third-party tortfeasor," notwithstanding its purchase of the worker's compensation insurance coverage contained in the CIP (Pet. App. 56a-57a).[5]

SUMMARY OF ARGUMENT

Section 905 of the LHWCA is simple and straightforward. It extends immunity from common law suits for negligence to employers in return for satisfaction of their duty to provide workers' compensation benefits to their employees regardless of fault. Under no circumstances does Section 905 extend immunity to contractors, to owners, or to any other voluntary provider of workers' compensation benefits. The legislative history of the LHWCA strongly confirms that Congress meant what it said when it enacted the Act in 1927. The Act has remained unaltered, despite decisions under the New York Law, upon which it was based, and decisions under the LHWCA confirming that only the immediate employer is entitled to immunity.

Section 933 of the LHWCA is also simple and straightforward. It guarantees the injured employee's common law right to pursue a claim for negligence against any "third person." Section 933 of the Act extends immunity from suit to fellow employees of injured workers, but does not mention contractors, owners or other voluntary providers of workers' compensation benefits. The legislative history of Sec-

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[5] When these lawsuits were commenced, it was presumed that the injured employees' immediate employers were immune from suit under Section 905(a), because compensation benefits had been paid under the CIP on behalf of and in the name of the immediate employers. WMATA implies that respondents should have known that their employers, rather than WMATA, were subject to suit (Pet. Br. at 24-25). Petitioner's assertion that counsel for respondents "knew of the wrap-up insurance program and its consequences long before they filed the complaints against Bechtel" (Pet. Br. at 24-25) is simply an unfounded falsehood. None of respondents' counsel knew any more about WMATA's CIP prior to instituting the actions againt Bechtel than the fact that one carrier, Lumberman's Mutual Casualty Company, insured all contractors and subcontractors for workers' compensation and liability, and that one adjusting company, National Loss Control Service Corporation, adjusted all the workers' compensation and liability claims. The details of the CIP were revealed during discovery proceedings against Bechtel in 1981. Counsel for respondents certainly had no reason to suspect that the CIP would turn an employer into a third party and a third party into an employer.

tion 933 and subsequent amendments to the Act provide a further strong indication that Congress did not intend to limit the definition of "third person" or to limit an injured workers' common law rights any more than the language of the Act plainly states.

In the face of the plain language of Sections 905(a) and 933(a) of the Act, petitioner argues that Section 904(a) of the Act extends immunity to contractors who purchase workers compensation insurance on behalf of subcontractors. Respondent submits that petitioner has offered no evidence of legislative intent and no relevant policy considerations which justify ignoring the language of the statute. Section 904(a) of the LHWCA does not extend immunity from suit to contractors in return for satisfying their secondary contingent obligation under that section. Section 904(a) of the Act is simply not an immunity provision. Moreover, WMATA's purchase of insurance for the contractors on the Metro system was not a response to a default by any contractor, and was intended to satisfy the statutory obligations of the contractors, not any statutory obligation that WMATA may have had. Therefore, if anyone is entitled to immunity, it is those contractors. Furthermore, even if Section 904(a) did confer immunity from suit to contractors, WMATA is not a contractor within the commonly understood meaning of the term. Extending immunity to an owner of a construction project who is not in the construction business does not serve the policies which the authorities that recognize broad statutory immunity rely on in support of such immunity.

Respondent's arguments that the Court of Appeals' decision will paralyze the purpose of the LHWCA to ensure employee compensation coverage, will undermine Congress' intent to ensure swift delivering of benefits, and will create a "litigation explosion" are unsupported. Logic and a rational understanding of the court's decision, the operation of the LHWCA and the insurance business compel the conclusion that the court's decision will produce none of these results. Rather, the court's decision will promote the purpose of the LHWCA to ensure coverage and payment of benefits, while preserving every employee's common law rights and furthering on the job safety. Similarly, the Court of Appeals' decision will produce none of the anomalous results outlined by petitioner and by *amici curiae* and, in any event, none of these claimed anomalies are relevant to the purposes of the Act or sufficient to overcome the plain language employed by Congress.

Finally, if this Court concludes that WMATA is entitled to immunity from suit, the immunity conferred should bar only traditional tort suits based on the negligence of WMATA employees. It would be an anomalous result, indeed, if WMATA also received immunity for the torts of Bechtel, for which it is solely responsible under Section 80 of the WMATA Compact, leaving respondents with no remedy for Bechtel's tortious conduct.

ARGUMENT

I. Only The Immediate Employer And Persons In His Employ Are Entitled To Immunity From Suit By The Employer's Injured Employee Under Sections 905 And 933 Of The Longshoremen's And Harbor Workers' Compensation Act.

A. The plain language of Sections 905(a), 933(a) and 933(i) of the LHWCA extends immunity from suit only to employers who secure payment of compensation to their employees, and to officers and employees of such employers.

As Petitioner notes, this Court has often stated that the courts should respect the plain language of the LHWCA whenever possible, adhering "closely to what Congress has written." *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 602-603, 616-617 (1981); *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 103 S.Ct. 2045, 2049 (1983); *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 273-274 (1980) ("Pepco"); *Director, OWCP* v. *Rasmussen*, 440 U.S. 29, 47 (1979). Furthermore, Section 905(a), like any provision which limits common law rights, "must be strictly construed, for '[n]o statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express'." *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 304-305 (1959) (quoting *Shaw* v. *North Pennsylvania R.Co.*, 101 U.S. 557, 565 (1879)).

The plain language of Section 905(a) extends immunity from suit only to an employer, and only when that employer satisfies his statutory obligation to secure payment of compensation to his employees, as prescribed by Section 904(a). There is no dispute, of course, that WMATA is not the employer of any of the respondents in this case. Nowhere in the LHWCA has Congress stated or implied that, while it chose to expressly extend immunity only to employers, it in fact

intended to extend immunity to contractors who purchase compensation coverage for employees of subcontractors. Had it intended to extend immunity to contractors, Congress could easily have drafted the first Section 905(a) to read: "the liability of an employer *or contractor* as prescribed in Section 4 shall be exclusive and in place of all other liability of such employer *or contractor*. . . ." Given that Section 905(a), by its clear and unequivocal terms, extends immunity only to employers, and that WMATA is not the employer of respondents, WMATA must show a clear expression by Congress that it did not intend to extend immunity from suit only to employers. *Rodriguez*, 451 U.S. at 604. Congress neither demonstrated such an intent when it enacted the LHWCA in 1927, nor elected to do so when amending relevant portions of the Act in 1938, 1959 and 1972. As discussed in detail in Part I(B), below, a review of the legislative history reveals that Congress has never intimated at a purpose at odds with the plain language of Section 905(a).

Congress also addresses the respective rights of employers, employees and third parties in Section 933 of the Act. As in Section 905(a), Congress clearly and unequivocally stated its purpose. The clear wording of Section 933(a) permits an injured employee to pursue his common law right to damages against anyone "other than the employer or a person or persons in his employ."[6] Similarly, Section 933(i) provides that compensation is the exclusive remedy when an injury is caused by the negligence or wrong of a fellow employee, and that the provision does not affect the liability of anyone other than an officer or employee of the employer. Nowhere in Section 933 does Congress evince an intent to limit the definition of third person, or to extend immunity beyond the employer-employee family.

In summary, since there is nothing ambiguous about the language chosen by Congress, WMATA's invitation to ignore the plain language of the LHWCA and to "rewrite Congress' words" should be declined and the language chosen by Congress should be "regarded as conclusive." *Rasmussen*, 440 U.S. at 47; *Consumer Product Safety Comm'n.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

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[6] Section 933(a) was amended by Congress in 1959 to expressly provide that an injured employee need not elect between his statutory right to compensation and his common law damage action against a third person. *Rodriquez*, 451 U.S. at 611, n. 27; *Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. 74, 80 (1980).

B. The legislative history of the LHWCA and the provisions of and decisions under the New York Compensation Law, upon which the Act is based, confirm that Congress intended to extend immunity only to the injured worker's employer and fellow employees.

The LHWCA was enacted by Congress on March 4, 1927. The Act was based on the New York Workmen's Compensation Law as amended in 1922,[7] which "was considered one of the best workmen's compensation laws of its time."[8] A review of the provisions of the New York law which supplied the model for Sections 904 and 905 of the LHWCA, and an examination of the structure of that law lends additional support to an interpretation of Section 905(a) consistent with its unambiguous language.

The 1922 New York law consisted of seven articles. Article 2 sets forth, in Sections 10 and 11, the *quid pro quo* compromise incorporated by Congress in Sections 904 and 905(a) of the Act.[9] The New York legislature left no doubt that only employers and employees are involved in this compromise. Nowhere in Sections 10 or 11, or in any other part of Article 2, are contractors mentioned.

One of the new provisions enacted by the New York legislature in 1922 was Section 56, whose clear purpose was to ensure the immediate employer's compliance with his Section 10 responsibility to secure compensation to his employees.[10] This provision, which was located in Article 4 of the New York law under the heading "Security for Compensation," makes no reference either to immunity or to Section 11, supplying further persuasive evidence that the New York legislature

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[7] 1922 N.Y. Laws, Ch. 615.

[8] *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 275-276 (1980). *See* H.R. Rep. No. 1190, 69th Cong., 1st Sess., 2 (1926); *See also* H.R. Rep. No. 1422, 70th Cong., 1st Sess., 1-2 (1928).

[9] 1922 N.Y. Laws, Ch. 615 §§ 10 and 11.

[10] 1922 N.Y. Laws, Ch. 615, § 56.

Section 56 provided, in pertinent part:

A contractor . . . who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured whose injury arises out of and in the course of such . . . employment, unless the subcontractor primarily liable therefor has secured compensation for such employee so injured as provided in this chapter.

did not intend to confer immunity in return for the contractor's secondary compensation liability.

The LHWCA, as enacted in 1927, substantially adopted these statutory provisions. The first sentence of Section 904(a) and the entirety of Section 904(b) of the Act, like Section 10 of the New York law, place a mandatory and primary statutory obligation on each employer to provide his employees with compensation, regardless of fault. Section 905(a), employing language virtually identical to Section 11 of the New York law, confers immunity in return for satisfaction of the obligations prescribed by the first sentence of Section 904(a). The second sentence of Section 904(a) adopts, in very similar but abbreviated language, the secondary obligation imposed on contractors by Section 56 of the 1922 New York law. Thus, while Congress rearranged and consolidated certain provisions of the New York law, it left those provisions virtually intact. If Congress intended to enact a statutory provision providing for immunity substantially broader in scope than that of the New York law, it employed language very poorly designed to do so.

The legislative history of the Act also indicates that Congress did not intend to enact an immunity provision more expansive in scope than that of New York. Although Congress did not specifically discuss Section 905(a) or the scope of immunity, it is significant that Congress nowhere indicated that it did not intend the section to have the same meaning as the virtually identical provision of the New York law. *Pepco*, 449 U.S. at 275-76.

The legislative history of the DCWCA and subsequent amendments to the LHWCA, as well as the parallel interpretations of the New York and Federal Acts by the judiciary, further support an interpretation of Sections 905 and 933 consistent with their language. Prior to the passage by Congress of the DCWCA in 1928,[11] the New York Court of Appeals was presented, in *Clark* v. *Monarch Engineering Co.*, 248 N.Y. 107, 161 N.E. 436 (1928), with the question of whether the secondary liability imposed on contractors by Section 56 of the New York statute destroyed any common law rights of action which existed prior to the enactment of Section 56. The court did not address the

[11] Public Law No. 419, 70th Congress, Passed May 17, 1928.

broad question of whether a contractor obtains an employer's immunity when it is legally required to pay compensation benefits to an employee of a subcontractor who has failed to satisfy his statutory obligation. The court did, however, decide that at least where the secondary, contingent liability of a contractor has not arisen, the immunity provided by Section 11 does not extend to contractors. Clark, 248 N.Y. at 108.

Against the backdrop of both the New York law and the New York Court of Appeals' unanimous decision, Congress thereafter passed the DCWCA.[12]

In 1938, Congress passed the first of a series of amendments to Section 933 of the Act. Concerned that the assignment of all third-party rights to the employer upon mere acceptance of compensation might force workers to make a hasty and improvident election, Congress decided that assignment should not occur until the employee accepts compensation under an award in a compensation order. The 1938 amendment and the legislative history of that amendment plainly demonstrate Congress' continuing intent to allow workers to pursue their common law remedies against third parties should they so desire. In addition, the legislative history makes clear that the amendment was based on a similar provision in the New York law, indicating that Congress continued to hold the New York law in high regard, and reinforcing the similarity of purpose of the two Acts.[13]

Congress passed more extensive amendments to Section 933 in 1959. The most significant of the 1959 amendments changed Section 933(a) to allow an employee to pursue a third-party liability suit without forfeiting his right to compensation. Congress also amended Section 933(b) to postpone the assignment of any third-party action

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[12] As this Court has stated, "(w)e may presume 'that our elected representatives, like other citizens, know the law.'." *Director, OWCP* v. *Perini North River Assoc.*, 103 S.Ct. 634, 649 (1983), (quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979).

[13] *See*, S. Rep. No. 1983, 75th Cong., 3d Sess. 9 (1938). In fact, a review of the entire Senate Report reveals that amendments to Sections 902, 907, 908 and 938 in the same enactment were also based on similar provisions in the New York law.

until six months after acceptance of compensation under an award.[14] Again, Congress manifested a desire to expand the ability of employees to pursue third party remedies and, again, the amendments paralleled similar developments in the New York law.[15]

Perhaps the most important 1959 amendment, for purposes of this case, was the addition of Section 933(i) of the Act, which provides immunity from common law suit to officers and employees of the employer. The Senate Report indicates that Section 933(i) was added to protect the worker from the risk of a large common law liability should he negligently injure a fellow employee. S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959). Having considered the scope of immunity provided by the Act, Congress determined that fellow employees needed further protection. Congress apparently did not conclude that contractors required similar protection. Congress' failure to demonstrate an interest in extending immunity to contractors is particularly significant because the New York Court of Appeals had determined in 1946 that the New York Workmen's Compensation Law did not extend immunity to a contractor, even where the contractor was obligated to pay compensation to the plaintiff as the employee of an uninsured subcontractor. *Sweezey* v. *Arc Electrical Construction Co.*, 295 N.Y. 306, 67 N.E. 2d 369 (N.Y. 1946).[16]

The court in *Sweezey* reasoned that since the general contractor was clearly a third party within the meaning of Section 29 (the equivalent of Section 933 of the LHWCA), since it was difficult to find in Section 56 (the equivalent of the second sentence of Section 904(a) of the Act) any expression of legislative intent to destroy the employee's common law negligence action, and since the contractor was clearly not an employer within the meaning of Section 11 (the equivalent of Section 905(a) of

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[14] For a detailed review of the 1959 amendments, as well as the problems which led to the amendments, see this Court's decision in *Rodriguez*, 451 U.S. at 609-612.

[15] The 1959 amendments to section 933 follow substantially similar to amendments to the New York Worker's Compensation Law. *See, Bloomer*, at 81, n.5; *See also*, S. Rep. No. 428, 86th Cong., 1st Sess. 3 (1959).

[16] The decision of the District Court in *Thomas* v. *George Hyman Constr. Co.*, 173 F.Supp. 381 (D.D.C. 1959), denying immunity in return for the voluntary purchase of insurance by a general contractor for the benefits of employees of subcontractors, was also rendered prior to the 1959 amendments.

the Act), there was no reason to read into Section 56 an intent to make the liability imposed by that section exclusive. *Sweezey*, 295 N.Y. at 306-308.[17]

The court also stressed that there is no employer-employee relationship between the contractor and the employee of a subcontractor, and that no fictional relationship need be created to justify the secondary liability imposed on contractors. The liability of the contractor is, rather, based on its relationship to the subcontractor, and is that of a guarantor. *Id.* at 308.

The New York court's analysis reveals the true significance of the fact, addressed by WMATA (Pet. Br., pp. 30-34), that Congress referred only to the employer, and not the contractor, in numerous sections of the Act relating to compensation liability. Congress undoubtedly had every expectation, as evidenced by the criminal penalties provided by Section 938(a) of the Act, that employers would obey the law, and that the contractor's secondary liability would therefore be rarely invoked. That the scheme has been successful is reflected by the fact that questions concerning the contractors liability or immunity have rarely arisen under the LHWCA, and by the fact that Congress has not deemed it necessary to amend the Act to extend immunity to contractors.

The New York court's reasoning also exposes the fallacy of petitioner's (and Professor Larson's) "economic fairness" arguments. WMATA has, in effect, recovered its lien and received a *quid pro quo* by virtue of its instruction to contractors to recognize that WMATA has purchased compensation insurance for them when submitting their bids. (J.A. 104).[18]

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[17] Petitioner grossly misstates the holding of the *Sweezey* Court, claiming that the basis of the court's holding was that the contractor's secondary duty was merely to *pay* rather than to *secure* compensation (Pet. Br. at 23, n. 31). As stated above, the New York court's holding was based on its interpretation of Sections 10, 11, 29 and 56 of the New York statute. If the fact that Congress used the word "secure" rather than "pay" has any significance, it is only that it suggests that Congress, for the further protection of employees, wanted contractors to purchase insurance to secure their secondary liability. Assuming that this is so, it does not at all affect the applicability here of the New York court's reasoning.

[18] Petitioner also implies that WMATA is somehow being held legally liable for both compensation payments and for its torts. This argument fails because it assumes that

The legislative history of the 1972 amendments to the LHWCA also supports a literal reading of Section 905(a). For the first time, Congress was extended an invitation to expand immunity beyond the employer-employee relationship. Congress declined that invitation. The House Report accompanying the version of the bill enacted by Congress states that "[t]he Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 4 (1972).[19]

Congress also reiterated the salutory effect of third-party actions, stating that "permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person providing a safe place to work." Id. at 6.

Since Congress spent considerable time and effort discussing third party actions, and specifically rejected an opportunity to create statutory employer immunity for shipowners, it is reasonable to presume that Congress was aware of and approved of the growing body of

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the compensation insurance provided here covered WMATA's liability. To the contrary, the coverage was intended to satisfy the employers' obligations (J.A. 47-68, 104, 106-108, 225). WMATA merely voluntarily paid the premium (See further discussion in Part II(B)(1) of our argument). WMATA also implies that the Court of Appeals' decision will place an unexpected economic burden on Lumbermans Mutual Casualty Company and on the public, to whom the cost of insurance coverage is ultimately passed. This argument is puzzling. According to the logic of WMATA's legal argument, the employers covered under the C I P have failed to satisfy their statutory duty to secure compensation, and are subject to suit by their employees. If this is the case, then the alternative proposed by WMATA would merely cause the roles of WMATA and the contractors with respect to compensation and tort liability to be reversed, resulting in systemwide tort liability at least equal in scope.

[19] This Court concluded in *Jones and Laughlin Steel Corp.* v. *Pfeifer*, 103 S. Ct. 2541 (1983), that a longshoreman may, under certain circumstances, sue the owner of a vessel, even if the longshoreman is employed by the owner. It cannot have been Congress' intention that a longshoreman may sometimes sue his employer, despite the language of Section 905(a), but an employee of a subcontractor may not sue the contractor, despite the fact that the contractor clearly qualifies as a third-person within the meaning of Section 933(a), and is not an employer within the meaning of Section 905(a). One must assume that Congress intended a relatively consistent scheme of liability in the longshore industry.

caselaw under the Act denying general contractors immunity under Section 905(a). *See, e.g., Probst* v. *Southern Stevedoring Co.*, 379 F.2d. 763 (5th Cir. 1967).[20]

In summary, the legislative history of the Act and its amendments, as well as the New York statute and the decisions of the New York courts thereunder, clearly support an interpretation of Sections 905(a) and 933 consistent with their plain language.

II. Neither Contractors, Who Have A Secondary Contingent Obligation To Secure Payment Of Workers' Compensation Benefits To Employees Of Subcontractors, Nor Owner-Contractees, Such As WMATA, Who Have Neither A Primary Nor A Secondary Duty To Secure The Payment Of Workers' Compensation Benefits For Employees Of Subcontractors, Are Entitled To Immunity From Suit By Employees Of Subcontractors.

A. The Court of Appeals correctly decided that contractors have merely a secondary, contingent obligation to secure the payment of compensation under Section 904 (a) to employees of subcontractors.

1. The plain language of the Act requires every employer, including subcontractors, to secure the payment of compensation to its employees.

The first sentence of Section 904(a) plainly states that "every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title." This statutory language is simple, direct, and mandatory, and places a primary obligation on every employer, including subcontractor-employers. Sections 907, 908 and 909 of the Act enumerate the employer's duties: Section 907 sets forth the employer's obligation to provide medical services; Section 908 sets forth the employer's obligations for various categories of disability; and Section 909 sets forth the employer's compensation obligations when the employee's injury results in death.

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[20] The issue appeared, at the time, to be well settled, and an entire body of local case law governing negligence actions in this context was developing. *See, eg., Bowman* v. *Redding & Co.*, 449 F.2d 956 (D.C. Cir. 1971) (evidentiary standards where general conractor has violated OSHA regulations).

Petitioner argued in its Petition for a Writ of Certiorari that the second sentence of Section 904(a) "plainly supplants any duty that subcontractors would have as 'employers' under the first sentence of Section 904(a)" and that "(a) contractor has a continuing duty to obtain compensation insurance and a subcontractor, by contrast, has no duty *at all* to obtain such insurance" (Pet. for Cert. at 12). This reading of the second sentence of Section 904(a) is deficient on its face for three reasons. First, if Congress had intended to make the contractor responsible for securing workers' compensation for its subcontractor's employees, it would have omitted the phrase "unless the subcontractor has secured such payment" from the second sentence of Section 904(a). Second, Congress would have qualified the clear and mandatory duty of every employer to secure compensation pursuant to Section 904(a)'s first sentence so that subcontractors would be exempted from this duty. Finally, if Congress had intended the contractor to have the only obligation to secure compensation, then surely it would have explicitly awarded the contractor immunity in Section 905(a). For these reasons WMATA clearly has neither the only duty nor the primary duty to secure compensation under Section 904(a).

WMATA does not, however, repeat this argument in its brief. Instead, petitioner merely restates the language of the statute, without taking a firm position as to whether the obligations of the contractor are primary or secondary. WMATA seems to imply one of two alternative explanations for its immunity claim: that the contractor has the option to secure insurance for his subcontractors, and may supplant the employer's duty and immunity *at any time*, or that his secondary obligation confers immunity, as long as he purchases the coverage *prior* to the subcontractor. A contractor unquestionably does not have the power to obtain immunity by voluntarily securing compensation at any time he chooses. Such action would clearly not be based on any duty imposed by Section 904(a), and would prevent the subcontractor-employer from fulfilling his mandatory statutory obligation under the first sentence of Section 904(a). The second alternative would similarly leave the employer-subcontractor in default of his obligation as an employer. This interpretation of Section 904(a) creates a race between the contractor and subcontractor to "secure" workers' compensation for the subcontractor's employees under Section 904(a). If the contractor wins the race, he also wins statutory immunity from suit. If the subcontractor loses the race, which he will

always lose under a unilaterally prescribed program such as the CIP, he finds himself in default of his statutory obligation to secure compensation.

The language of Section 937, which was enacted with Section 904(a) in 1927, also lends support to the conclusion that Congress intended every employer to secure compensation for his own employees. Section 937 requires the vessel owner to make sure, prior to hiring the stevedore, that the stevedore has properly complied with Sections 904(a) and 932 of the Act, and to obtain proof of that compliance. Section 937 does not give the vessel owner the primary duty to secure the compensation benefits for the stevedore's employees. To the contrary, stevedoring firms have the primary duty, like all other employers, to secure the payment of compensation for their employees pursuant to Section 904(a).Section 937, like Section 904(a), was designed specifically to ensure compliance with the provisions of the Act by the immediate employer by placing a burden on the party for whom services are to be performed to demand proof of statutory compliance by the party he employs. The contractor and vessel owner are liable only when they fail to satisfy this burden, and may be described as statutory "guarantors" of payment of compensation under the Act to employees of the parties they hire.

Congress clearly cannot have intended that the relative economic strength of the contractor and subcontractor would determine who secures compensation and who obtains immunity. Congress must have meant what the language of Section 904(a) plainly states, and what the language of every section of the Act relating to the payment of compensation obviously presumes: that the employer has a primary, mandatory duty to secure compensation.

2. The legislative history of the Act supports the conclusion that Section 904(a) places only a secondary, guarantee-like liability on a contractor to employees of its subcontractors.

The legislative history of the LHWCA, and of subsequent amendments thereto, supports the conclusion that a contractor's liability under Section 904(a) is contingent, and that the subcontractor-employer has the primary statutory obligation to secure compensation for his own employees. As discussed in Part I of this argument, it is beyond dispute that the LHWCA was based on the New York Com-

pensation Law of 1922. It is equally clear, moreover, that the second sentence of Section 904(a) was drawn from Section 56 of the New York law, which states in even plainer terms that the duty of the employer is primary and that the contractor's duty is secondary and protective in nature. While Congress did not discuss the relevant language of Section 904(a) in great detail, the Senate Judiciary Committee did state that the section contains "the appropriate provisions for making certain that compensation will be paid." S.Rep. No. 973, 69th Cong., 1st Sess. 16 (1926). There is absolutely no indication in the legislative history that Congress intended to change the nature of the contractor's obligation to the employees of subcontractors from that expressed by the New York statute.

Congress' clear intent is further manifested by an attempt by Senator Prouty in 1971 to broaden the immunity provisions of the Act by amending Section 904(a) of the Act. S. 525, 92d Cong., 1st Sess. (1971). Senator Prouty's bill would have broadened the definition of "employer" in Section 902 of the Act to include vessels, would have placed a secondary liability on vessel owners to secure compensation for employees of other employers working on the vessel, and would have extended immunity to *all* employers working on the vessel whenever *any* employer secured the payment of compensation to the injured worker. *See Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92nd Cong., 2d. Sess. (Committee Print 1972). The bill was poorly drafted, and its precise scope is unclear, but its introduction by Senator Prouty is significant because the bill provides an example of the type of statutory language necessary to evidence an intent by Congress to immunize a party other than the employer from suit. The fact that such language was proposed and rejected is further evidence that Congress intended that only an employer who has complied with his primary obligations under Section 904(a) is entitled to the immunity prescribed in 905(a).

Finally, the fact that Congress has never acted, despite the fact that the courts have unanimously held that the contractor's duty is secondary in nature, and that this contingent liability for compensation does not confer immunity, is further evidence that the Court of Appeals' conclusion that WMATA's duty is secondary and contingent is manifestly correct.

B. The Court of Appeals correctly concluded that WMATA's secondary duty to purchase workers' compensation coverage was not invoked under the facts of these cases, and that the voluntary purchase of such coverage does not confer immunity from suit.

1. Because the coordinated insurance program was designed not to satisfy any obligation on the part of WMATA, but rather the obligations of Metro contractors, only the contractors may attempt to claim immunity thereunder.

Petitioner argues that it is entitled to statutory immunity because it had an obligation as a "contractor" to purchase compensation coverage for the employees of "subcontractors," and because it satisfied that duty. WMATA's argument is logically premised on the important assumption that the CIP was designed primarily to satisfy WMATA's statutory obligations, rather than those of the construction contractors and subcontractors. The issue of whose obligation the CIP was intended to satisfy forms the core of petitioner's assertion that contractors who satisfy *their* Section 904(a) duty are entitled to immunity as a reward or *quid pro quo* for the satisfaction of that obligation. Surely, WMATA cannot argue that it, or anyone else, would be entitled to immunity in return for satisfying another party's obligation.

Yet, this is precisely what the CIP was designed to accomplish.[21] This fact is most clearly demonstrated by the specifications for the CIP issued by the Authority and Metro Insurance Administrators (J.A. 102-111). In the Introduction to the specifications, WMATA states that the insurance policies are being "made available to contractors and subcontractors" (J.A. 104). Under the "General Description of the Insurance Program," the Authority again states that it will procure and pay for insurance "for the benefit of contractors and others" (J.A. 106). In the same section, WMATA notes that "Certificates of Insurance . . . will be issued as required on behalf of those contractors

[21] The factual setting here is the practical equivalent of a situation in which a general contractor, who has already separately contracted to protect *his* obligation, simply agrees with a subcontractor that it would make economic sense, because the general contractor has greater buying power, for the general contractor to purchase the coverage and for the parties to share the cost savings. As petitioner's note, the CIP apparently effected such a cost savings (Pet. Br. at 41, n. 60).

and subcontractors covered by the policies." (J.A. 107-108, 110-111, 225).

The insurance policies issued by Lumberman's Mutual Casualty Company (LMC) further confirm that the CIP was designed and intended to satisfy the statutory obligations of the contractor and subcontractors to their employees. The endorsements to the insurance policies reveal that the "Name of Insured" for purposes of the policies, was "any contractor" and "any subcontractor" on the construction jobsites (J.A. 128). In fact, WMATA is a qualified self-insured under Section 932 and has no need for any compensation insurance for its own employees.

The compensation claim forms filed on behalf of respondents, settlement petitions submitted for approval to the U.S. Department of Labor by LMC and respondents, and the compensation orders reflecting approval of those settlement petitions remove any doubt that all compensation claims have been made against respondents' direct employers, that claims have been paid by LMC on behalf of those employers, and that the agency charged with the administration of workers' compensation in the District has considered these claims to have been paid on behalf of the employers. (J.A. 50-51, 55-57, 66-67).[22]

2. WMATA instituted the coordinated insurance program not because subcontractors failed to satisfy their statutory obligations, but for reasons of administrative efficiency and cost savings.

WMATA's argument rests in large part on the claim that it was legally obligated to purchase compensation insurance coverage for the employees of Metro contractors under the facts of this case. As discussed above, the secondary obligation of a contractor arises only upon a default by the immediate employer on his primary statutory obligation to provide coverage under Section 904(a). As we have shown, the

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[22] Commentators on wrap-up insurance programs also agree that such programs are designed to satisfy the primary statutory obligations of contractors and subcontractors, and that the legal relationships of the parties to the wrap-up agreement remain unchanged. Becker and Denenberg, *Wrap-Up of the Wrap-Up*, CPCU Annals 198-199, 203, 211. (Sept. 1967). *See also*, Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-06-0025-77-13 at 1-9 (Dept. of Transp. 1977).

CIP was and is intended to satisfy the obligations of the Metro contractors, not those of WMATA. The following discussion will show that, even assuming that the plan was intended to satisfy WMATA's duty, that duty has never arisen, because there is no evidence of subcontractor default. As the Court of Appeals recognized, the CIP was a voluntary plan which plainly pre-empted the employers' statutory duty.

WMATA claims in its brief that it initiated the CIP at least in part because "employees were at times left without coverage when individual policies lapsed—either because employers failed to make timely premium payments or because the insurance company involved went out of business." (J.A. 265, 285, 299) (Pet. Br. at 6). Petitioner's brief strongly implies that the record indicates that "gaps in coverage" were a major problem which had in fact occurred. Although WMATA's insurance director, upon whose testimony WMATA exclusively relies, expressed a concern that a "fly-by-night" insurance company might go out of business,[23] leaving the subcontractor's employees without protection,[24] there is no testimony or documentary evidence in the record to indicate that it had ever happened, and there is certainly no evidence that any of the employers involved in this case had ever defaulted on their obligations to their employees, or that they did not have insurance in effect at the time Phase II was instituted that would

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[23] The LHWCA provides ample protection against "fly-by-night" insurance companies. First, any carrier purporting to write workers' compensation coverage must be authorized under Section 932 of the Act to do so by the Secretary of Labor. *See, also*, 20 C.F.R. §§ 703.001-703.121 (1980). Second, the employee may look directly to the employer under Section 918(a) if the carrier defaults. Third, the employee may recover benefits from the Section 944 Special Fund if a judgment against the employer cannot be satisfied. Finally, an employee of a subcontractor may, of course, look to the general contractor who, as noted above, is covered for such eventualities by a standard workers' compensation policy.

[24] WMATA relies to some extent on its concern that sub-subcontractors (contractors two levels away from WMATA who do not have a contractual relationship with WMATA) would have difficulty obtaining insurance (Pet. Br. at 6, 17-18). As Professor Larson notes, however, "if an employee of the lowest subcontractor on the totem pole is injured there is no practical reason for reaching up the hirearchy any further than the first insured contractor" 1C A. Larson, *The Law of Workmen's Compensation*, § 49.11 at 9-13 (1983). It is difficult for WMATA to claim, therefore, that it has a duty under Section 904(a) to the employees of any contractors with whom it is not in a contractual relationship.

have covered respondents, assuming normal policy renewal and absent the dictates of the CIP. Similarly, there is no evidence in the record to suggest that any of these contractors had ever been uninsured in their non-Metro employment, where the CIP does not apply.

Given the lack of record evidence sufficient to support a finding that a secondary legal duty had arisen, WMATA must rely either upon the legal conclusion of its insurance director that it had such an obligation, or the concerns expressed by its insurance director about the "possibility" that such gaps in coverage would occur. (J.A. 263, 265, 299). Respondents submit that neither incorrect conclusions about the legal necessity for the institution of the plan nor concerns about *future* gaps in coverage, even if accurate, make the institution of wrap-up insurance any less voluntary.

3. The voluntary purchase of workers' compensation insurance on behalf of another employer does not, and should not, confer immunity from suit.

The only construction of the LHWCA which would permit an extension of immunity to WMATA under the circumstances presented here (assuming that WMATA is a contractor) is a broad rule that all contractors are entitled to immunity under the Act simply based on the secondary duty prescribed by Section 904(a). Although WMATA does not attempt to argue for such a rule, it does not formally concede that it is not entitled to such immunity (Pet. Br. at 18, n. 23).

Assuming that such an argument were not precluded by the plain language of Sections 904(a) and 905(a), as well as the unanimous judicial authority interpreting the LHWCA, there are also profound policy reasons why such immunity should not be granted.[25] As the House Report accompanying the 1972 amendments stated:

> It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, *by assuring that the employer bears*

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[25] WMATA's CIP explicitly recognizes that it may conflict with provisions of the LHWCA, for it states that the "[t]erms of [the] policy which are in conflict with the provisions of the workmen's compensation law are hereby amended to conform to such law." (J.A. 124).

> *the cost of unsafe conditions*, serves to strenghten the employer's incentive to provide the fullest measure of on-the-job safety.
>
> HR Rep. No. 92-1441, 92nd Cong., 2d Sess. (1972) (emphasis added).[26]

Providing immunity to contractors who voluntarily purchase compensation coverage for employees of other employers would reward such actions, and would subvert Congress' expressed policy that the employer should bear the cost of unsafe work conditions. The clear statutory language of Sections 904(a) and 932(a) places the financial burden on the direct employer to satisfy the safety requirements of Section 941(a) of the Act. The desire of Congress to promote a safe workplace, as expressed in the Act and its legislative history, should be respected. Therefore, statutory immunity should be denied.

C. Since WMATA is not a contractor but an owner-contractee, it has neither a primary nor secondary obligation to provide workers' compensation coverage.

WMATA cannot, of course, claim the benefit of any immunity which attaches to the contingent liability imposed on contractors by Section 904(a) of LHWCA unless it is, in fact, a contractor within the meaning of Section 904(a). As this Court has stated, the words used by Congress should be given their ordinary meaning unless a contrary legislative intent has been clearly expressed. *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982); *Burns* v. *Alcala*, 420 U.S. 575, 580-81 (1975). As the following discussion will show, WMATA does not qualify as a contractor according to either commonly understood definitions of the term or the usage of the construction industry. Moreover, prior to this litigation, neither the Authority, its con-

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[26] Barrett, *Insurance for Urban Transportation Construction* at 1-20. A. A. Mathews Inc., *Guidelines for Improved Rapid Transit Tunneling Safety and Environmental Impact. Volume I: Safety* at 3-3 to 3-6, J.A. 73-77;

The Washington Star Reported in the summer of 1981 that:

> "During the first several years of Metrorail construction, the transit agency's accident rate exceeded the national average because Metro paid insurance claims and it made no financial difference to contractors if they had a bad safety record. The attitude among many contractors was 'If you're not paying the bill what difference does it make?' said [David] Shilling [a project monitor.]

Washington Evening Star, June 16, 1981 at B1-B3.

tractors, the courts nor the commentators considered WMATA, or entities like WMATA, a contractor. Finally, the purposes of contractor-under provisions such as Section 904(a) of the LHWCA are not served by imposing secondary compensation liability on entities such as WMATA.

In order to be considered a contractor, an entity must have a contractual obligation to another to supply certain work or perform at an agreed price. Dictionary definitions place particular emphasis upon the use of the term to refer to one in the building or construction trades.[27] In the construction industry, prime contractors and subcontractors are distinguished from the owner of the project. According to the author of a reference book on construction contracting,

> The owner, whether public or private, is the instigating party that owns and finances the project, either from the owner's own resources or from some source of external financing. *Public owners are public bodies of some kind ranging from agencies of the federal government down through the state, county, and municipal entities to a multiplicity of local boards, commissions and authorities.*
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> * * *
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> The prime contractor, also known as the general contractor, is the business firm that is in contract with the owner for the construction of the project, either in its entirety or for some specialized portion thereof.
>
> R. Clough, *Construction Contracting* at 3 (4th Ed. 1981) (emphasis added).[28]

As WMATA concedes, it is a governmental agency created pursuant to "the WMATA Compact," an agreement between Maryland, Virginia and Congress, which acted on behalf of the District of Columbia. Section 12 of the Compact conferred upon the Authority all of

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[27] *See, e.g., Webster's New Collegiate Dictionary* (1980); *Webster's New World Dictionary*, (Second College Ed. 1979).

[28] The authors of a study commissioned by the U.S. Department of Transportation to assess the safety problems in rapid transit tunneling projects, in referring to WMATA as the owner of the Metro project, clearly contemplated definitions of owner and contractor substantially similar to those given by Dr. Clough. A. A. Mathews, Inc., *Guidelines for Improved Rapid Transit Tunneling Safety and Environment Impact, Volume I: Safety*, at 3-4, J.A. 73-74.

the typical powers of an owner of real estate, including the legal authority to construct, acquire, own, maintain, control or convey real estate. Nowhere did Congress or the states evidence an intent to create (or that WMATA should create) a construction company, and nowhere did it oblige WMATA to build a subway itself. Rather, the Compact delegated to WMATA the usual and expected responsibilities of an owner: to develop a plan for the project, to institute that plan by contracting with others to build it, and to monitor and supervise the project.[29]

The record in this case plainly establishes that WMATA is a public owner as defined by industry practice and that it consistently considered itself as such prior to this litigation. In the Authority's insurance specifications, its safety program manual, the design and construction manual, and its construction contracts themselves, WMATA is referred to simply as "WMATA" or "the Authority." The construction companies with whom WMATA contracts are referred to as "contractors" or "prime contractors" and second level contractors are referred to as "subcontractors." (J.A. 104-111, 133-139, 164-166, 190-218, 219-221, 222-224).[30]

A second, and equally important, reason why WMATA cannot be considered a contractor is that it does not have a contractual obligation. The signatories to the Compact created WMATA. WMATA's powers and obligations are therefore statutory, not contractual, in nature. If WMATA does not have a contractual duty to build the Metro system, then the construction companies with which it contracts cannot be subcontractors.[31]

WMATA's basis for claiming that it is a contractor within the meaning of Section 904(a) is three-fold: First, it claims that the WMATA contract is akin to a contract between the signatories by which a joint obligation to build the Metro system was created. This con-

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[29] D.C. Code Ann. § 1-2431 [4] [12-15] (1981).

[30] The judiciary has also recognized that WMATA is an owner. *See, WMATA* v. *Mergentime Corp.*, 626 F. 2d 959 (D.C. Cir. 1980). The contract documents discussed by the *Mergentime* court specifically referred to WMATA as "owner" of the Metro construction project.

[31] According to *Webster's New Collegiate Dictionary* (1980), a subcontractor is "an individual or business firm contracting to perform part of all of another's contract."

tractual obligation, claims WMATA, was then delegated to the Authority, creating WMATA's contractual obligation.[32] Respondents have been unable to find any legal support for the proposition that WMATA assumed a contractual obligation simply by coming into existence.

Second, WMATA claims that it should be deemed a contractor because it could have built the entire system itself. Theoretically, any owner could form his own construction company rather than hiring a contractor. Undoubtedly, owners do on occasion perform their own work. WMATA has conceded, however, that it would have been extremely difficult and impractical for WMATA to construct the subway system itself. (J.A. 277). In any event, theoretical ability to construct the system does not transform an owner into a contractor.

Third, WMATA claims that it is the "overall general contractor" for the Metro Construction Project because it, and only it, has an obligation with regard to the entire project. WMATA argues that the parties referred to in WMATA's construction contracts as prime contractors are in reality subcontractors because they are responsible only for a portion of the system (J.A. 276-271). This conception of the relationships between WMATA and the contractors is, again, not consistent with the ordinary meaning accorded these terms by the construction industry.[33]

The only frank and accurate description of WMATA's position is that WMATA believes that it should be deemed a contractor for purposes of Section 904(a) despite the fact that it is not a contractor but an owner.[34] Given that WMATA is clearly not a contractor within the plain meaning of the term, WMATA must show evidence of a "clearly

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[32] This interpretation of contract law was first suggested by Delmer Ison, WMATA's director of insurance claims. (J.A. 234-35, 253-54, 276-77, 279-300). Mr. Ison stated that he first came to the conclusion that WMATA was a contractor when preparing an affidavit for purposes of WMATA's motion for summary judgment (J.A. 296).

[33] *See* R. Clough, Construction Contracting at 11.

[34] In fairness to WMATA, some Courts have done so. Professor Larson has characterized the reasoning of these courts as "rather desperate attempts to maximize the protective reach of the statute." IC A. Larson, *The Law of Workmens Compensation*, § 49.11 at 9-10 (1983).

expressed legislative intention" that Congress meant "contractor" to mean "contractor or owner." *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 603, 604 (1981). No such expression of congressional intent exists, and none should be presumed.

The distinction between a contractor and an owner is much more than one of semantics. According to Professor Larson, the purpose underlying statutory provisions such as Section 904(a) is both to prevent evasion of workers' compensation acts by those who would subdivide their regular operations among irresponsible contractors, thus avoiding compensation liability and thereby effecting a cost saving, and second, to protect the employee from such uninsured subcontractors. IC A. Larson, The Law of Workmen's Compensation, Section 49.11 at 9-12 to 9-16 (1983). Professor Larson states that virtually all courts that have addressed the issue consider whether the subcontracted work is work which the employer, or other employers, would ordinarily do through employees, and indicates that another helpful test is whether the employer has the manpower and the tools to perform such work.[35] WMATA clearly does not satisfy either of these tests. Given the lack of persuasive reasons for ignoring the plain meaning of the statute and the common understanding of the term contractor, WMATA's arguments are best addressed to Congress.

III. The Appellate Case Law Unanimously Supports The Conclusion That The Petitioner Is Not Immune From Suit Under Sections 904(a) and 905(a)

Since the LHWCA was enacted in 1927, not a single appellate decision has found a general contractor to be immune under Section 905(a) from a suit for negligence by an injured employee of its subcontractor. *Probst* v. *Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967); *DiNicola* v. *George Hyman Construction Co.*, 407 A.2d 670 (D.C. App. 1979); *Fiore* v. *Royal Painting Co.*, 398 So.2d 863 (Fla.

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[35] *See* A. Larson, The Law of Workmen's Compensation § 49.11 at 9-16, 9-22, 9-41 (1983). The reason for these tests is, of course, that it would be unlikely that a contractor (or owner) would subcontract work for the purpose of evading the compensation law if it is not the type of work which he would under normal circumstances do himself.

App. 1981).[36] The only circuit court case which discussed this issue prior to the decision below was the Fifth Circuit's 1967 decision in *Probst* v. *Southern Stevedoring Co.* In *Probst*, the injured employee of a stevedoring subcontractor sued the general contractor in tort, pursuant to Section 933(a) of the Act. The general contractor claimed immunity under Section 905 by virtue of its statutory obligations under Section 904(a). The court denied the contractor's immunity claim, stating that it is clear from the language and structure of the Act that every employer, including a subcontractor, is primarily liable for and required to secure the payment of workers' compensation benefits to his employees. The court stated that the liability of a general contractor is secondary and protective in nature, and reasoned that this secondary, protective liability does not make the general contractor an "employer" within the meaning of Section 905(a).

The reasoning of the *Probst* court parallels closely the reasoning of the New York Court of Appeals in *Clark* v. *Monarch Engineering Co.*, 248 N.Y. 107, 161 N.E. 436 (1928). Since the two statutes contain substantially the same provisions, this result is not unexpected. The two cases even leave open the very same question: whether a general contractor called upon to pay compensation benefits to a defaulting subcontractor's employee obtains the employer's immunity under Section 905(a).

The New York Court of Appeals addressed that question in *Sweezey* v. *Arc Electrical Construction Co.*, 295 N.Y. 306, 67 N.E.2d 369 (1946), and held that the general contractor remains a third party amenable to suit even when it must make compensation payments to employees of a subcontractor. The only case to address this issue under the LHWCA reached the same conclusion as the New York court. In *Fiore* v. *Royal Painting Co.*, a Florida appellate court, interpreting an extension of the LHWCA, held that the general contractor was amenable to suit even where its subcontractor's insurance had lapsed and it had commenced paying worker's compensation benefits to the subcontractor's employee's widow. The court held that,

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[36] The local District of Columbia Courts presume that the general contractor is amenable to suit by employees of its subcontractors. *See, e.g., Martin* v. *George Hyman Construction Co.*, 395 A.2d 63 (D.C.App. 1978) (effect of violation of Safety Regulations enacted for benefit of class of worker of which plaintiff is a member).

despite this payment of benefits pursuant to the contractor's secondary duty under Section 904(a), the contractor remains a third person amenable to suit. The court reasoned that granting immunity "would reward a general contractor for failing to attend to its duty to assure that its subcontractor has the requisite coverage." *Fiore*, 398 So.2d at 865.

The decision below leaves open the question of whether a general contractor may obtain immunity if required to pay compensation to an employee of a defaulting subcontractor, and implies that the court might not be inclined to follow *Fiore* if such a situation arose (Pet. App. 53a, n.15). However, the only two courts that have been presented with the issue have recognized that, under the LHWCA, the only *quid pro quo* is between the employer and his employee. The employer *must* pay workers' compensation benefits to the employee, regardless of fault, and in return, the employee gives up his right to sue his employer in tort. The contractor's role is to enforce the subcontractor-employer's side of the "bargain."[37] As the discussion in Part I and Part II above demonstrates, it is quite clear from the language and structure of the Act that Congress did not believe that this role merited an extension of immunity in derogation of the employee's common law rights. Granting an employer's immunity to a general contractor would encourage general contractors to hire non-complying subcontractor-employers, and would undermine job safety, which the LHWCA seeks to promote.[38]

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[37] The *Fiore* court's conclusion is further supported by the fact that, in the event that the contractor must pay compensation to a subcontractor's employee, the contractor and his carrier have a right of indemnity against the subcontractor. *Sweezey*, 295 N.Y. at 308, 67 N.E. 2d at 371. *See also*, A. Larson, *The Law of Workmen's Compensation*, § 49.11 at 9-3 (1983).

[38] *See*, A. Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy against Employers*, Labor Law Journal, 683, 686-7 (Nov. 1983).

IV. Contrary To The Allegations Of Petitioner, The Court Of Appeals' Decision Promotes The Purposes Of The Longshoremen's And Harbor Workers' Compensation Act.

A. The Court of Appeals' decision will promote rather than undermine Congress' intent to ensure employee compensation coverage and allow third party actions except against the employer.

Petitioner argues that the "immediate and most damaging effect" of the Court of Appeals' decision is that it will lead to lapses in insurance coverage under the Act. As the following discussion will show, this allegation fails to appreciate that the statutory scheme recognized by the Court of Appeals has been successful since its inception. Moreover, WAMTA's claim is clearly unsupported by the practices of the insurance industry, the rational actions of general contractors and the record in this case.

WMATA's argument proceeds on the false premise that, absent wrap-up insurance, a contractor could not and would not know if and when a subcontractor had obtained insurance coverage. This is patently untrue. The very reason that "contractor-under" provisions such as that in Section 904(a) appear in virtually every compensation act is that the secondary liability imposed by such provisions provides an important incentive to contractors to find out whether, and to make sure that, their subcontractors are insured. It would not seem impractical for WMATA to send a simple form letter to each of its "subcontractors," requiring proof in advance that they are properly insured, requiring prompt notice of cancellation of insurance, and making payment of the contract price contingent on satisfaction of such conditions. For more than fifty years, employers have been insuring their employees under this statutory scheme, and petitioner has not cited to a single instance where a subcontractor's failure to secure insurance under the LHWCA has resulted in an employee failing to receive compensation benefits.[39] The reason is obvious—the scheme works.

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[39] The District of Columbia Workers Compensation Act of 1979, D.C. Code Ann. § 36-301 *et seq.*, (1981) adopts the relevant language of Sections 904(a) and 905(a) as Sections 36-303(c) and 36-304(a) of the new Act. The fact that these sections were adopted without change demonstrates just how effectively the law has arranged coverage.

Moreover, petitioner misapprehends the import of the decision below concerning the character of contractor's liability, and ignores the rational and well-established practices of the insurance industry. While the courts have uniformly refused to grant immunity to the contractor where the subcontractor has not failed to satisfy his primary statutory duty to provide workers' compensation coverage, no court has ever stated that it would be improper or illegal for a contractor to purchase insurance in advance to protect against subcontractor default.[40] In fact, purchasing such protective insurance would be the only rational thing to do, and all insurance policies written to cover general contractors expressly provide such coverage. The underwriting rules issued by the National Council on Compensation Insurance note that under most workers compensation laws the contractor is responsible for the payment of benefits to employees of its uninsured contractors, and specifically provide that the contractor's statutory responsibility is *automatically* insured by the Council's standard policy. National Council on Compensation Insurance, *Basic Manual for Workers' Compensation and Employers' Liability Insurance*, Rule IX-C, R-20, 21 (3d Reprint 1983). The Council provides that the contractor shall furnish satisfactory evidence that the subcontractor had workers' compensation insurance in force covering work performed for the contractor. *Id.* at R-20. If the contractor provides such evidence, he is assessed no additional premium. If he does not, he is simply charged the same premium that the subcontractor, given his payroll and experience modification, would normally be charged.

In summary, it is clear that the incentives that have always existed for general contractors to purchase protective insurance coverage remain unaltered and that no "gaps in coverage" need occur. It is not

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[40] Petitioner's claim that the Court of Appeals' decision throws into question whether contractors have "employer" responsibilities is entirely without merit. The Court of Appeals did not say or imply, as WMATA alleges, that a "volunteer" such as WMATA has no employer duties. It stated only that the voluntary payment of benefits by one who does not have a statutory duty to pay does not provide the payor with immunity. Section 904(a) states quite clearly, moreover, that a contractor whose secondary duties are invoked is responsible for all the benefits payable under Sections 907, 908 and 909. Obviously, the contractor would also be responsible for obeying other sections which relate to the payment of those benefits.

necessary to provide an additional incentive to general contractors to attend to their clear statutory responsibilities by rewriting the Act to provide them with immunity from suit.

B. The Court of Appeals' decision should not impede the delivery of benefits under the LHWCA.

Petitioner argues that denying immunity to contractors "like WMATA" will frustrate Congress' interest in the prompt and certain disposition of claims, because such contractors are given an incentive to contest claims in order to avoid conceding that an injury is work-related and to avoid providing funds for the tort suit. As the following discussion will show, such conflicts do not exist absent wrap-up insurance, and may well be the most dangerous of its disadvantages.

Under typical insurance schemes, the employer pays the premium and has a common interest, with its carrier and the employee, in pursuing actions against negligent third parties.[41] As Congress has recognized, such third party actions encourage safety because they encourage safe conduct.[42] Under the Court of Appeals' decision and a standard insurance plan, these interests are promoted, and no conflict of interest occurs. Under wrap-up insurance, however, the interests of the compensation carrier are at odds with those of the employee, both because a potential third party pays the insurance premiums and because the same carrier covers all compensation and liability losses on the project. This creates a disincentive for the carrier to pursue third-party actions, and an incentive to avoid investigation of the circumstances surrounding accidents or to withhold any information obtained from the employee, in many cases effectively preventing the injured employee from pursuing his third-party rights.[43]

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[41] The most important exception to this rule is the conflict of interest which results when the compensation and liability carriers are the same. *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525 (1955). While the continuing vitality of the *Czaplicki* exception to the assignment provisions of Section 933(b) has not yet been decided by this Court, there is no question that the problems recognized by the *Czaplicki* Court are common, particularly with the advent of wrap-up insurance.

[42] H.R. Rep. No. 92-1441, 92nd Cong. 2d Sess. 6 (1972). *See generally*, W. Prosser, *Handbook of the Law of Torts*, Ch. 1 (4th Ed. 1971).

[43] National Loss Control Service Corporation ("NATLSCO"), the subsidiary of Kemper Insurance Company responsible for adjusting both compensation and liability

Moreover, this conflict of interest also provides incentives to contest the employee's compensation claim, for the reasons discussed in petitioner's brief.[44] Carriers like LMC will hopefully ignore such temptations, and will adhere to their responsibilities to their named insured and the insured's employees to pay claims expeditiously. But the clear conflicts of interest created by the wrap-up program nevertheless cannot be denied, and if the contractor or owner who purchases the policy exerts the control over the carrier suggested by WMATA's brief, such results are inevitable.[45]

In summary, the Court of Appeals' decision does not in any way affect the traditional legal relationships existing on multiple employer construction projects and, therefore, does not create the anomolous result suggested by petitioner. If such results do occur, and if they are violative of the spirit and intent of the Act, they are a product of wrap-up insurance.

C. The third party actions allowed by the Court of Appeals are a remedy that has been permitted by the LHWCA since its inception

Petitioner and *amici* argue that the Court of Appeals decision will create a "massive spate" of burdensome litigation, unprecedented in the history of the courts, and not within the contemplation of Congress. Petitioner and *amici* repeatedly cite the 1972 amendments and

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claims under the CIP, routinely withholds investigative information from claimants and plaintiffs' attorneys.

[44] Petitioner claims that a reversal of the Court of Appeals' decision would obviate this problem. This claim is not accurate. If the immediate employer gives up his immunity to WMATA and becomes a third party subject to suit, the carrier would still have the same incentive to contest the compensation claim in order to defeat the possiblity of a liability claim.

[45] One of the claimed advantages of wrap-up insurance is that administrative savings occur because disputes over which contractor is responsible for benefits are rendered irrelevant. *See, eg.*, Becker and Denenberg, *Wrap-Up of the Wrap-Up* CPCU Annals at 202 (Sept. 1967). Unfortunately, this does not always occur. Recently, LMC asserted in an occupational disease claim that the statute of limitations had run because the claim was filed against one member of a joint venture rather than against the joint venture. The Administrative Law Judge rejected this defense, stating that the "carrier may not escape liability by simply playing a corporate 'shell' game" *Gilmore* v. *Peter Kiewit Sons Co., Inc.*, 83-DCWC-89 at 3 (Feb. 23, 1984).

the accompanying House and Senate reports to support the contention that Congress intended to end third party actions. In 1972, Congress eliminated suits by longshoremen against the shipowner based on the doctrine of "unseaworthiness," which made the shipowner liable regardless of fault. The "unseaworthiness" remedy, combined with the very high accident rate in the longshore industry and numerous indemnity suits by shipowners against stevedores, had caused the court congestion referred to by petitioner. The 1972 amendments were intended to remedy this problem, and embodied a trade of sorts: the longshoremen's compensation benefits were substantially increased, and the shipowner no longer had to protect against suits *not* predicated on negligence. In addition, indemnity agreements between shipowners and stevedores were voided, thus eliminating further costly litigation and making the longshoreman's and stevedore's interest in recovering damages in a third party negligence suit identical. *See generally Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 616-617, (1981); *Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. 74, 82-84 (1980).

Suits based on negligence were specifically left untouched in 1972, Congress leaving no doubt that it believed that such suits would further the interest of protecting the health and safety of employees. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. at 6-7. As petitioner and *amici* should be aware, the Court of Appeals has created no new remedies, and has not allowed any suits apart from those that have been clearly permitted by the plain language of the LHWCA since its enactment in 1927 and that have been unanimously approved by the courts interpreting the Act.

Petitioner's argument that further litigation will result due to gaps in coverage caused by the claimed inevitable termination of wrap-up insurance is also without foundation. As disucssed in Part V of our argument, the Court of Appeals decision will not cause the termination of the CIP. Moreover, even if wrap-up were terminated, the elective remedy suits discussed by petitioner need not occur. If WMATA gives adequate notice to the Metro contractors of the termination of the CIP, they will undoubtedly purchase all insurance necessary to prevent gaps in coverage.

Petitioner's argument that the Court of Appeal's decision will cause indeminfication suits arising out of agreements between WMATA and

its contractors must fail because, again, it is based on the false premise that the Court of Appeals decision marks the end of wrap-up insurance. Moreover, whether such indemnity agreements are valid under the LHWCA is a matter of law that has nothing to do with on the proper interpretation of Sections 904(a), 905(a), and 933(a) and which, in fact, is an issue addressed by Congress in 1972 and which is currently before the courts *precisely because* third party actions such as these cases are permitted by the Act.[46]

In summary, respondents' actions are clearly permitted by the Act, and are entirely within the contemplation of Congress. Whether the remedy is to be exercised by the injured employee is a matter for the employee to decide, and which depends on the totality of the circumstances in any case.[47] If petitioner desires to amend the Act to preclude third-party actions, its argument, again, should be addressed to the legislature.[48]

V. The Court Of Appeals' Decision Will Produce None Of The Anomalous Results Alleged By Petitioner, And Such Considerations Do Not, In Any Event, Justify Ignoring The Plain Language Of The Act Or The Clear Intent Of Congress.

Petitioner argues that the Court of Appeals' decision will produce a variety of "anomalous results." As the following discussion will show,

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[46] The District of Columbia Court of Appeals has expressly left open the issue of whether indemnity agreements between contractors and subcontractors are barred by Section 905(b) of the Act. *DiNicola* v. *George Hyman Construction Co.*,. 407 A. 2d 670, 675 (D.C. App. 1979). The United States Court of Appeals for the District of Columbia Circuit has not been presented with the issue. At least one district court judge has stated that Section 905(b) is applicable to the District of Columbia. *Walker* v. *Bechtel Associates Professional Corp.*, No. 81-1125 (D.D.C. Feb. 4, 1982).

[47] Contrary to petitioner's statements, suits are not now being filed at the rate of two to four per week. Approximately 110 suits have been filed pursuant to Section 933(a) of the Act since early 1981. Respondents submit that this does not qualify as a litigation explosion, particularly given the number of injuries for which compensation has been paid.

[48] Petitioner implies that one need not be concerned about respondents right to pursue actions against third persons because only the attorneys will benefit. *Amicus* Alliance of American Insurers goes one step further, implying that suits are brought with the attorney primarily in mind. These arguments are, of course, entirely extra-legal, and should have no application to the interpretation of the plain language Sections 905(a) and 933(a) of the Act.

none of these "anomalous results" will occur. More importantly, however, WMATA does not even atempt to demonstrate that these "policy considerations," even if accurate, reflect palpably on Congress' intent in enacting the LHWCA or that they justify ignoring the plain language of the Act.

A. Wrap-up will be terminated only if the contractors and subcontractors covered thereunder are found not to have secured compensation within the meaning of Section 904(a), thus subjecting them to suit as a third party or to an elective remedy under Section 905(a).

Petitioner's claim that wrap-up insurance is dead rests on a number of false premises, the most obvious of which is the claim that the Court of Appeals' decision has diminished the cost-effectiveness of wrap-up insurance. The success of wrap-up programs in general, and of the CIP in particular, has never been founded on cost savings realized by substantial changes in the legal relationships between owners, contractors, subcontractors and their employees. To the contrary, the cost effectiveness of wrap-up insurance is based largely on administrative savings, reduction of construction costs, stimulaton of competition in the insurance industry, the economies of scale, and the elimination of subrogation suits, which become unnecessary when all risks are covered by the same carrier.[49] While the commentators disagree somewhat as to the relative importance of various cost factors, none has suggested the possibility that cost savings might be realized by the elimination of third-party lawsuits. Since none of the cost savings estimated prior to the institution of wrap-up insurance were based on this factor, and since none of the actual cost savings realized since then have been due to successful claims of immunity, it is difficult to understand how the Court of Appeals' decision will suddenly cause the collapse of the CIP. WMATA had no immunity prior to wrap-up, has had none between 1971 and 1984, and will not suffer unexpected or increased responsibilities if it remains subject to suit.

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[49] *See eg.*, Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-06-0025-77-13 at 1-8 (Dept. of Transp. 1977); Ashley, *Preliminary Insurance Program Selection for Urban Mass Transit Project Construction*, Report No. UMTA-NY-06-0071-81-1 at 14 to 21 (Dept. of Transp. 1981), Becker and Denenberg, *Wrap-Up of the Wrap-Up*, CPCU Annals 202-204, 211 (Sept. 1967).

Even assuming that immunity for WMATA was an expected benefit of the CIP (there is, of course, no evidence that this was the case), such immunity would nevertheless not result in the savings of public funds claimed by the Authority. The logical product of WMATA's arguments is a scheme by which the immediate employer would be subject to suit as a third party. Respondents assert that, if anything, this would lead to more tort litigation, and increased insurance costs. The litigation currently pending in the District Courts and the local courts is based, in most cases, on the failure of Bechtel and WMATA to properly attend to their duties to ensure reasonably safe conditions in the workplace, to enforce federal and local safety standards, and to compel compliance by contractors when necessary. *See, e.g., Johnson* v. *Bechtel Associates Professional Corporation, D.C.*, amended complaint J.A. 1, N.R. 54. In virtually all of these cases, the immediate employers of the injured workers were equally at fault for breaches of similar duties. In some, the negligence of the employer was active, while that of WMATA and Bechtel was passive in nature. Since active negligence is far easier to prove than passive negligence, it would appear that the scheme proposed by WMATA may well result in more and larger awards than would the traditional scheme.[50]

The wrap-up insurance plan will collapse only if it is determined by Congress, the District of Columbia government, or the courts that the plan violates public policy and may no longer be used, or if it is determined that it does not satisfy the employer's duty under Section 904(a), or the equivalent provisions of the District of Columbia Workers' Compensation Act of 1979.[51] Since the Court of Appeals' decision is

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[50] The scheme proposed by WMATA would result in substantial savings only if LMC could also avoid responsibility for the contractors' torts. Respondents expect that the contractors would attempt to claim both that Section 904(a) grants them immunity, and that WMATA exercises sufficient control over their activities so that they are entitled to the immunity provided to agents of WMATA by Section 80 of the WMATA Compact.

[51] There is no question that wrap-up programs are problematic, despite possible but by no means undisputed economic advantages. As commentators have noted, and as the Court of Appeals implied, such insurance programs remove the contractor's vested interest in safety. *See, e.g.*, A. A. Mathews, Inc., *Guidelines for Improved Rapid Transit Tunneling Safety and Environmental Impact, Volume I: Safety*, Report No. UMTA-MA-06-0025-77-7 at 3-3 to 3-6 (Dept. of Transp. 1977); Becker and Denenberg, *Wrap-Up of the Wrap-Up*, at 202, 206, 208; National Academy of Science,

not premised on either of these conclusions, however, the future of wrap-up is not material here.[52] In summary WMATA has neither shown that the decision of the Court of Appeals will diminish the use of comprehensive insurance plans nor has it explained why such a result provides a justification for ignoring the plain language of the LHWCA.[53]

B. Whether the Court of Appeals' decision will subject WMATA to divergent liability within the Metro System is irrelevant to the interpretation of the LHWCA.

WMATA and *amici* Commonwealth of Virginia and State of Maryland claim that it is "important to emphasize" that the law of Virginia and Maryland would provide immunity to WMATA, and that a denial of immunity to WMATA under the Act would subject WMATA to an "intolerable" divergent liabilty within the Metro system. WMATA and *amici curiae* fail to explain, however, how the workers compensation laws of Virginia and Maryland are relevant to the interpretation of a Federal Act or to the intention of Congress in enacting that legisla-

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Better Contracting for Underground Construction, PB-236973 at 35-39 (1974); R. Poulton, *Disadvantages of Wrap-Up Plans*, CPCU Annals (Winter 1965).

The Court of Appeals concluded that WMATA "circumvented the statutory scheme" by instituting wrap-up but expressed no opinion on the issue of whether wrap-up satisfies the contractors' Section 904(a) duty (Pet. App. 56a). The District of Columbia Court of Appeals has held that, although WMATA paid the premiums, the immediate employers secured the compensation insurance within the meaning of Section 904(a). *Edwards* v. *Bechtel Associates Professional Corp. D.C.*, 466 A.2d 436, 438 (D.C. App. 1983).

[52] It should also be noted that, although Congress has not precluded the use of wrap-up insurance, it apparently has not discussed its propriety in the context of the requirements of the LHWCA. Legislative inaction does modify the plain terms of the Act. *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 615 (1981).

[53] WMATA suggests that Congress would be "astounded to learn" that the money it has approved for wrap-up constituted "mere voluntary contributions" by WMATA to workers who may still sue WMATA in tort. Respondents submit that Congress would be astounded to learn that WMATA and its carrier have attempted to utilize a voluntary insurance program to substantially alter the rights and liabilities of every contractor and every worker on the Metro construction project, despite the fact that WMATA has reclaimed its insurance costs by ordering contractors to subtract such costs from their bids.

tion. While it would be difficult to deny that Congress' purpose was not to enact legislation resulting in diverging liability within the Metro system, it is equally incorrect to presume that the Congress that enacted the LHWCA was concerned with enacting a statute consistent with those of Maryland and Virginia. WMATA, like every other individual or entity, is subject to differing legal rights and obligations in the jurisdictions in which it operates. Whether the laws of Maryland or Virginia provide immunity to WMATA is simply not material for purpose of the present inquiry.

Moreover, the argument that a denial of immunity to WMATA would create divergent liability is based on the faulty premise that the laws of Virginia and Maryland clearly would immunize WMATA. In fact, this is not the case. Virginia extends immunity from suit by employees of subcontractors to owners (such as WMATA) or contractors only if the subcontracted work is of the type normally carried on through employees rather than independent contractors.[34] Maryland extends immunity only to principal contractors who contract to perform work which is part of their trade, business or occupation, and who subcontract the whole or any part of that work. Maryland does not extend immunity to owners under any circumstances.[35]

Plainly, neither Virginia nor Maryland would extend immunity to WMATA under the facts of this case. Because WMATA is not in the construction business, a grant of immunity would neither be justified by the policies underlying statutory employer statutes, nor by the body of case law interpreting the statutes of Virginia and Maryland. To the extent, then, that consistent interpretation of the statutes of the three jurisdictions is a relevant policy consideration (and respondents do not so claim), such consistency supports a denial of immunity to WMATA.

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[34] *See e.g., Vandergrift* v. *United States*, 500 F. Supp. 237 (E.D. Va. 1979), *aff'd.* 634 F.2d 628 (4th Cir. 1980); *Bassett Furniture Industries, Inc.* v. *McReynolds*, 216 Va. 897, 224 S.E. 2d 323 (1976); *Shell Oil Co.* v. *Leftwich*, 212 Va. 715, 187 S.E. 2d 162 (1972).

[35] *See, e.g., Honaker* v. *W. C. & A. N. Miller Dev. Co.*, 278 Md. 453, 365 A.2d 287 (1976); *Warren* v. *Dorsey Enterprises*, 234 Md. 574, 200 A.2d 76 (1964); *Honaker* v. *W. C. & A. N. Miller Dev. Co.*, 285 Md. 216, 401 A.2d 1013 (1979).

C. The Court of Appeals' decision will not affect the paticipation of minority contractors in Metro contracting and such participation, though of value to society, is in any event not relevant to the interpretation of Sections 904(a) and 905(a) of the LHWCA.

The argument that the Court of Appeals' decision will prevent minority owned construction companies from participating in construction projects subject to the LHWCA is premised on the validity of WMATA's claim that the decision marks the end of wrap-up programs. As discussed above, the continuing viability of wrap-up insurance plans will be determined not by the issue of WMATA's amenability to suit in these cases, but by whether such plans are found consistent with the purposes of the Act. The Court of Appeals' decision does not change the longstanding and heretofore undisputed legal relationships on construction jobsites, does not affect the profitability of wrap-up insurance, and thus will not affect the ability or incentive of WMATA to hire or to fund the hiring of minority contractors.[36] While the concerns of the minority contractors are understandable, they are neither well founded nor are they relevant to the issues of statutory construction presented by these cases. Wrap-up insurance claims many advantages, and must concede many disadvantages, some of which are discussed above. One of the primary positive effects claimed by proponents of wrap-up insurance is that it allows minority owned companies, and new and small companies in general, who may otherwise be uncompetitive in the marketplace, to bid on and participate in large construction projects.[37] Certainly, an argument may be made

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[36] The assertion that Metro contractors will be tempted to use fewer minority subcontractors is without merit. First, to the extent that possible third party liability is a disincentive to subcontracting, such has been a fact of life since Congress decided in 1959 that employees need not elect their remedies. Second, WMATA can and does, by contract, set out specific requirements for the award of subcontracts and retains the right to approve subcontractors (J.A. 192-193, 195, 197-198, 203). Third, specialty work traditionally performed by subcontractors cannot as a practical matter be performed by general contractors who do not have the necessary expertise, and who are primarily concerned with the structural integrity of the project. Moreover, if Congress had desired to promote subcontracting at the expense of third-party actions, it undoubedtly would have repealed Section 933 of the Act.

[37] While wrap-up does afford a benefit to subcontractors who simply cannot afford to pay for insurance, it is not the practice of the insurance company to charge higher premiums, as the National Association of Minority Contractors claims, because such

that affirmative action goals and concern for the growth of small business in general outweighs the inherent safety risks of subcontracting to new and unestablished firms. The fact that such policies concern WMATA, and that the federal government encourages the participation of minority enterprises in federally funded programs does not, however, justify ignoring the plain language of the LHWCA or the clear intent of Congress. Sections 905(a) and 933(a) of the Act relate to the interaction of workers' compensation and tort law, and the principles and policies, such as industrial safety, the economic protection of workers, and the moral responsibility for wrongs, which form the foundation of these laws. While the concerns expressed by WMATA and the National Association of Minority Contractors would perhaps be relevant to the interpretation of certain types of statutes, they should not affect the interpretation of a statute which expresses no concern for the cost of insurance or the promotion of small business, and which is color-blind.

VI. If Immunity Is Granted To WMATA, That Immunity Should Extend Only To Suits Based On Tortious Acts Committed By WMATA And Its Officers And Employees.

If this Court decides that WMATA, by virtue of its initiation of the CIP, is entitled to the immunity extended to employers by Section 905(a), it must then decide what scope to give that immunity. The only intepretation of that scope which harmonizes the purposes of Section 933(a) with those of Section 80 of the WMATA Compact limits any grant of immunity to WMATA to suits based on alleged tortious conduct by the Authority or its employees. Perhaps more than any issue, the issue of the interrelationship of Section 80 and the LHWCA brings into play the principal that the "Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and

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subcontractors cannot guarantee timely payment of premiums. *See, generally*, National Council on Compensation Insurance, *Basic Manual for Workers' Compensation and Employers Liability Insurance* (1980). It is similarly unsubstantiated and untrue that small contractors are forced to turn to unreliable and financially weak insurance companies. If the contractor has difficulty purchasing insurance on the open market, he may request an "assigned-risk" policy, which will be provided, at competitive rates, by a financially secure and reliable carrier. *See, generally*, Northeastern Council on Compensation Insurance, *District of Columbia Workers' Compensation Plan, Information and Procedures*, (1st Reprint 1984).

incongruous results." *Director, OWCP* v. *Perini North River Associates*, 103 S. Ct. 634, 637 (1983) quoting *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953)). The interpretation of Section 905(a) advanced by petitioner would result in *no one* being responsible for the tortious conduct of Bechtel, a result surely not in the contemplation of Congress, and clearly violative of public policy.

Section 80 of the WMATA Compact provides that WMATA is liable for torts committed by its directors, officers, employees and agents in the exercise of proprietary functions, and that the exclusive remedy for such torts is by suit against the Authority. Section 80 does not purport to bar any causes of action or to limit substantive rights of injured workers such as respondents in any way. Section 80 merely prescribes that the sole *remedy* for the torts of agents such as Bechtel is by suits against WMATA.[38]

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[38] As petitioner has noted (Pet. Br. at 10 n.14), respondents also sued Bechtel, the contractor responsible for the supervision of safety on the Metro Construction project. The parties agreed that Metro Construction was a proprietary function, but disputed Bechtel's role as an agent of WMATA within the meaning of Section 80.

At the evidentiary hearing in the *Johnson* case, counsel for WMATA indicated that WMATA was not concerned with the Section 80 aspect of the litigation, because WMATA provided the insurance for both WMATA and Bechtel, and any recoveries would come from the same "pot of money." At the hearing, the judge granted plaintiff's motion to add WMATA as a party defendant, and stated that WMATA could file a memorandum of law concerning the Section 80 issue if it desired. *Johnson* v. *Bechtel Associates Professional Corp., D.C.*, evidentiary hearing, May 17, 1982 at 8-9. It is clear from the fact WMATA never at any stage of the litigation opposed Bechtel's motion for summary judgment that it accepts responsibility for Bechtel's torts pursuant to Section 80.

Although Counsel for WMATA indicated that it did not matter, practically speaking, whether WMATA or Bechtel was responsible for Bechtel's torts, because both were covered by the wrap-up insurance plan, WMATA now claims that Section 905(a) and Section 80 of the Compact should be interpreted as interacting to destroy respondent's causes of action. Interestingly, WMATA answered the amended complaint three days later, claiming as an affirmative defense that complaint was barred by the Act. Within approximately a month the motion for summary judgment was filed (J.A. 1, 56, 62). It is obvious that WMATA and LMC have attempted to funnel all liability towards WMATA under Section 80, and then create an umbrella of immunity with Section 905(a) of the Act. If this Court decides that WMATA is entitled to immunity as a statutory employer, and respondents' employers succeed in obtaining immunity

By the same token, Section 933(a) of the Act permits suits against any third party except the injured person's employer or fellow employees. Even assuming that WMATA steps into the shoes of the employer for purposes of the immunity provided by Section 905(a), it would require a massive leap of illogic to hold that WMATA is immune not only from suits premised on breaches of WMATA's duty to respondents, but also from suits based on breaches by Bechtel, for whose torts WMATA is held responsible *by statute*.[59] Even assuming the validity of WMATA's *quid pro quo* analysis, the rationale supporting Section 905(a) immunity does not apply to suits based not on WMATA's liabilty in tort, but rather compelled by statutory prescription.[60] Nothing in the language of either Section 933 or Section 905 indicates any intention on the part of Congress to bar anything other than causes of action in tort against the employer. The causes of action against WMATA based on the tortious acts of Bechtel are based, not in tort, but on the expressed purpose of the Compact signatories to assume liability for the torts of all agents.[61]

Granting full immunity to WMATA would also subvert the oft-stated principle that when "there are two acts upon the same subject, the rule is to give effect to both if possible . . ." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States* v. *Borden Co.*, 308

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either under Section 80 of the Compact (as agents of WMATA) or under Section 905(a) of LHWCA, all or virtually all third party rights on the Metro Construction project will have been eliminated, creating a huge windfall for WMATA and its carrier.

[59] The complaints against WMATA in these cases contain counts based both on the negligence of WMATA and counts premised on WMATA's Section 80 liability. *See, e.g., Johnson*, amended complaint J.A. 1, NR. 54.

[60] These cases present the clearest possible case for application of the "dual capacity" or "dual-persona" doctrine. *See, e.g., Jones and Laughlin Steel Corp.* v. *Pfeifer*, 103 S.Ct. 2541 (1983).

[61] This argument is further buttressed by the fact that WMATA would not be responsible, based on traditional tort concepts, for the torts of independent contractor-agents such as Bechtel. WMATA could be held liable for breach of a non-delegable duty if an agent such as Bechtel improperly performed its tasks. Such liablity, however, has always been treated as the tort of the *contractee*, not that of the agent. *See, e.g., Lindler* v. *District of Columbia*, 502 F.2d 495 (D.C. Cir. 1974). Thus, WMATA cannot argue that limiting any grant of immunity as suggested here would permit respondents to recover for torts which would be barred by Section 905(a) absent Section 80. The cause of action does not *exist* but for Section 80.

U.S. 188, 198 (1939)). Assuming that WMATA is entitled to immunity at all, limiting that grant to counts based on the negligence of WMATA or its employees, for which WMATA would be vicariously liable under traditional tort concepts, would serve to best harmonize the purposes of Section 905(a) and 933(a) of the LHWCA with those of Section 80 of the Compact.

Denying immunity for counts based on Section 80 would also serve the principle that statutes should be construed, if possible, so as to render all parts operative. *Administrator, FAA* v. *Robertson*, 422 U.S. 255, 261 (1975). Such an interpretation would preserve both the traditional tort immunity accorded by Section 905(a) and the right to pursue claims for damages guaranteed by Section 933(a).

CONCLUSION

The Court of Appeals decision is entirely consistent with the plain language of all applicable sections of the LHWCA, and the voluntary institution of the CIP by petitioner does not provide a justification for ignoring that language. Since petitioner is a third party amenable to suit under the LHWCA, the judgment of the Court of Appeals should be affirmed and these cases should be remanded to the District Courts for trials.

Respectfully submitted,

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